In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 194

FEDERAL TRADE COMMISSION, PETITIONER

v.

R. F. KEPPEL & BROTHER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

Respondent appears to rely largely on the proposition that in order to be unfair within the meaning of Section 5, a practice must involve restraint of trade or deception. It asserts that (Brief, p. 44), "It is not all practices against morals which are condemned but those only which involve the elements of deceit or monopoly." The Commission contends, on the other hand, that the question of unfairness cannot be decided by so simple a test as whether deception or restraint of trade is involved, and, as pointed out in the main brief (pp. 24–25), this Court has not so narrowly restricted

the meaning of the phrase "unfair methods of competition."

As indicated in *Federal Trade Commission* v. *Beech-Nut Packing Company,* 257 U.S. 441, 453, each case must be decided on its own facts; the Commission must examine into the actual effect of the practice complained of upon the consuming public and upon competitors. The evidence in the record in this case discloses that the "break and take" method of selling penny candy is calculated to, and does in fact, take unfair advantage of the children who purchase it. Contrary to the assumptions indulged in by the court below and by respondent (Brief, p. 32) the child does not know all the facts, and does not deliberately choose the "break and take" candy because he is willing to obtain a smaller piece of candy in exchange for the opportunity to win a prize.

The fact is, as pointed out in petitioner's main brief (pp. 29–30), that the child does not make a conscious choice, but is lured into purchasing the "break and take" candy by the hope (vain to the extent of 180 chances against the child, for example, in the School Days 200 assortment) of obtaining something for nothing. He hopes to receive a "free prize," and does not stop to consider that he may have very limited chances of success. The fact, which is conceded by respondent (Brief, p. 31), that the child pays no attention to what his chances of winning may be, would seem to prove

conclusively that he acts blindly in preferring the "break and take" over the "straight goods" candy, being deluded by the appeal to his cupidity and gambling instinct.

In this respect it is interesting to note, and it is submitted, that inducing purchases by appealing to the cupidity and gambling instincts of children is assimilable to deception, is opposed to good morals in very much the same way that deception is, and is, therefore, within the ruling in the *Winsted* case, 258 U.S. 483, and the language of *Federal Trade Commission* v. *Gratz*, 253 U.S. 421. Deception operates unfairly to influence purchase because the buyer is not exposed to the normal effect upon his purchasing judgment of all the facts. Some are withheld or misstated. If the truth were known he would probably not buy. Appealing to the cupidity and gambling instincts of children operates unfairly to influence purchase, because though the buyer knows all the facts (we assume here that the extent of the gambling chances is made known), they do not operate upon his purchasing judgment with normal effect, for the reason that the presence of the gambling appeal diverts him from considering either the unlikelihood of winning or the probable inferiority in size or quality of the candy.

In the one case, the unfairness is due to the absence of the true facts. In the other case,

the unfairness is due to the circumstance that, while the true facts are present, they are overshadowed in the mind of the purchaser by the gambling appeal, and thus the situation is as if the true facts were not present. In the one case, the purchase is made because the true facts are not present. In the other, the purchase is made in spite of their presence. In both cases, a device, deception in the one and the arrangement of candies for a gambling appeal in the other, is what causes the buying; both devices are unfair to the purchaser, and hence to the competitor who does not use them. The child would seem to be as much entitled to protection against an unfair sales practice in respect to penny candy as is the adult in respect to a woolen garment.

What has just been said clearly distinguishes the present case from the case of *N. J. Asbestos Company* v. *Federal Trade Commission*, 264 Fed. 509, upon which respondent relies. That case involved the practice merely of providing free entertainment to customers in order to promote good will. The element of unfairness to the consumer in inducing particular purchases, which is present in the instant case, was not present there.

Respondent asserts (Brief, p. 34) that the arguments in petitioner's main brief are "directed toward the mere ethics" of the sales method in question. Elsewhere in its brief (p. 38) respond-

ent states that the Commission is seeking to encroach on the functions of other regulatory agencies and to assume a paternalistic control over all types of business practices in commerce. Again, it is said (Resp. Brief, p. 37) that the Commission has no power broadly to prevent gambling. These assertions are not helpful to respondent.

The Commission does not claim to be vested with power to prevent gambling, or to impose ethical standards on business men, or to exercise any function other than that provided for in Section 5 of the Federal Trade Commission Act. Its contention is that upon the facts in the record in this case, it is clear that the "break and take" method of selling penny candy is unfair within the meaning of Section 5, both to consumers, and to competitors who do not employ that method of selling their products.

Respondent asserts (Brief, p. 36) that if Congress had intended that the sales methods here involved should be prohibited as lotteries it could have enlarged the scope of the Federal anti-lottery laws. Respondent also urges in effect that the local anti-lottery laws are not being strictly enforced, and that the Commission should not assume to restrict practices which the local authorities do not themselves undertake to prevent. This is answered by the *Winsted* case, *supra*. The practice there condemned (false labeling) violated the local

laws against the obtaining of money by false pretenses. Nevertheless, this Court did not feel obliged to forbid the Commission to restrain the use of deception as an unfair trade practice, merely because it was also a violation of the criminal laws of the States, whether or not those laws were being enforced.

Respondent (Brief, pp. 45–49) challenges the sufficiency of the evidence to show any substantial effect of the practice here involved upon competition. The record does not indicate the exact extent of the competition which is affected, but there can be no question that it is substantial. Representatives of 9 competitors of respondent appeared to testify. The names of these competitors are listed at page 12 of petitioner's main brief. The evidence indicates that some 70 members of the National Confectioners Association do not sell "break and take" candy.[1] (Petitioner's Main Brief, p. 14.)

Respondent seeks to attach some sinister significance to the fact that the National Confectioners Association has taken a position opposed to the use

[1] Respondent points out (Brief, p. 47) that some of its competitors who do not sell "break and take" candy fail to do so because their type of merchandise is not suited to this method. This fact, if true, tends to refute the lower court's assertion (R. 375) that what respondent does, its competitors are free to do. If there are competitors who cannot employ the same method, they are all the more entitled to protection.

of the "break and take" method. This fact would, however, seem rather to indicate that a larger number of competitors are opposed to the use of this method of selling penny candy than the record otherwise indicates. It is not material, and it is not incumbent upon the Commission to show, the exact portion of the industry that is adversely affected by the practice complained of. It is sufficient that it clearly appears that trade is diverted to respondent and others from a substantial number of competitors who do not employ the practice complained of. *Federal Trade Commission* v. *Raladam Company,* 283 U.S. 643.

The opinion in the *Raladam* case also points out (p. 651) that it is not necessary to show that any particular traders are injured. The evidence shows (Petitioner's Main Brief, pp. 12–16) that the "break and take" method of selling candy is generally injurious to the business of manufacturers of "straight goods," and it necessarily follows, as the Commission found (Par. Nine, R. 19), that the use of this method by respondent injuriously affects the sale of "straight goods."[2]

The attempt of respondent to show (Brief, p. 24) that the "break and take" method of selling candy has been universally recognized as a legitimate

[2] The finding of the examiner quoted at page 8 of respondent's brief was not adopted by the Commission and is, therefore, of no effect. It is not, however, in any way inconsistent with the findings of the Commission.

trade practice over a long period of years, and has been so regarded by the Commission in the past, is without basis in fact. Respondent refers to no evidence of record or other authority in support of its assertions. The only evidence in the record indicates that while candies with pennies concealed in them have been sold for many years, "break and take" candy generally did not become a competitive factor until after 1922 or 1923 (R. 126, 154). At that time the National Confectioners Association sought to terminate the use of that method of selling candy by voluntary action of the industry (Petitioner's Main Brief, pp. 11–12, 14). There appears to have been continuous conflict within the industry over the question. Compare *Federal Trade Commission* v. *Algoma Lumber Co.*, No. 240, decided January 8, 1934.

So far as the prior attitude of the Commission is concerned, the records of the Commission indicate that it had issued 5 complaints prior to the time when the present proceeding was instituted, one of which was dismissed, and a stipulation filed to the effect that the defendant would discontinue the practice (Docket 1165—Robert F. MacKenzie Company, complaint issued May 9, 1924); two resulted in cease and desist orders (Docket 1304—Reinhart & Newton Company, complaint issued April 1925; Docket 1370—Lauer & Suter Company, complaint issued March 9, 1926); and two other similar complaints were dismissed without any

reasons for the dismissal being stated. It is quite impossible, therefore, to infer any administrative approval of the "break and take" method in the past.

Certain other contentions of respondent are here briefly noted:

Respondent urges (Brief, pp. 30–31) that the Commission argues for the first time in this Court that the practice complained of involves bad faith; that there is no such charge in the complaint, and that the charge was expressly disclaimed by counsel for the Commission. The record references (R. 70, 71) do not support the assertion that counsel for the Commission disclaimed any charge of bad faith; the disclaimer related only to charges of false advertising or deception. The complaint fully sets forth the practice complained of, and the failure of the complaint to characterize the practice as involving bad faith does not prevent the Commission from arguing in this Court that bad faith is involved, particularly when the court below (R. 375) held to the contrary.

With respect to respondent's objection (Brief, pp. 52–53) that paragraphs 4 and 5 of the Commission's cease and desist order are too broad in that they prohibit the packing and assembling of respondent's assortments, the contention being that packing and assembling are not commerce, the Court's attention is directed to the introductory paragraph of the cease and desist order (R. 26)